89-1931

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ESTHER MOUNT AND HUSBAND JIM MOUNT

v.

MELVIN F. GORELICK, M.D., AND ROGER BARTELS, M.D., EACH INDIVIDUALLY

PETITION FOR A WRIT OF CERTIORARI TO THE STATE OF CALIFORNIA SUPREME COURT

JIM MOUNT
Attorney for self and ESTHER MOUNT, deceased.

13211 Cielo Azul
Castroville, California 95012
(408) 373-3337
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QUESTIONS PRESENTED

1. Whether petitioners' failure to produce expert testimony in rebuttle of respondents' motions for summary judgment is sufficient to deny petitioners' right to a jury trial, when expert testimony is not required to prove the gist of petitioner's pleading, to-wit: the lack of informed consent.

2. Whether petitioners' failure to produce expert testimony in rebuttle of respondents' motions for summary judgment is sufficient to deny petitioners' right to a jury trial, when petitioners produced interrogatories and answers from respondents, as well as depositions that supported petitioners' pleading and raised issues requiring

submission to a jury.

3. Whether respondents' motions for summary judgment unrebutted by petitioners' expert testimony can overrule case law, to-wit: expert testimony is not required to prove lack of informed consent.

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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ESTHER MOUNT AND HUSBAND JIM MOUNT

v.

MELVIN F. GORELICK, M. D., AND ROGER BARTELS, M.D., EACH INDIVIDUALLY

PETITION FOR A WRIT OF CERTIORARI
TO THE STATE OF CALIFORNIA
SUPREME COURT

Jim Mount, on behalf of himself and his deceased wife, Esther Mount, petitions for a writ of certiorari to review the judgment of the State of California Supreme Court in this case.

OPINIONS BELOW

The opinion of the superior court of the State of California, County of Monterey,

(App. A, infra) is not reported. The opinion of the court of appeal of the State of California, sixth district, (App. A, infra) is not reported.

JURISDICTION

The judgment of the State of California Supreme Court affirmed the judgment of the State of California court of appeals, sixth district, without an opinion. A petition for review was denied on November 29, 1989 (App. A, infra). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be other-

wise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT

Petitioners complain that respondents did not properly advise the decedent, Esther Mount, of alternative treatments and risks, and or the risks of the treatment she received at the hands of each respondent. The respondents, therefore, did not have the informed consent of decedent, Esther Mount, to perform their treatment.

Petitioners pleadings are sufficient to raise the issue of lack of informed consent by decedent, Esther Mount, to each of the respondents. Respondents in their answers to interrogatories, depositions, medical records, and declarations substantiated petitioners' pleadings, certainly to the degree of submission to a jury.

Petitioners did not file additional affidavits to respondents' motions for summary judgment as it is unnecessary to prove lack of informed consent by expert testimony in California.

The Superior Court granted respondents' motions for summary judgment. The Court of Appeal of the State of California, sixth district, affirmed the Superior Court judgment and denied a petition for review.

Petitioners have exhausted their State Court remedies.

REASONS FOR GRANTING THE PETITION

This case presents important questions concerning the distance to which a motion for summary judgment can be extended. In effect the holding of the State of California Courts permits the motions for summary judgment to change case law and go far beyond the legislative intent when enacting said motions,

to-wit: it is not necessary to produce expert testimony to prove lack of informed consent unless a motion for summary judgment is filed, then you must produce expert testimony. This must be done although you have already produced sufficient evidence to have a jury decide jury issues.

This is contra to a number of cases, but to cite only a few in hope that this Court will not easily trade a certainty for a doubt.

Robertson v. White, 635 F. Supp. 851 (1986) held that summary judgment should be "cautiously invoked" so that no person will be improperly deprived of his seventh amendment right to a jury trial.

Diederich et al v. American News Co. 128 F. 2d 144 (10th Cir. 1942) held the right to a jury trial guaranteed by the Federal Constitution cannot be impaired or taken away by state constitutional or statutory provisions.

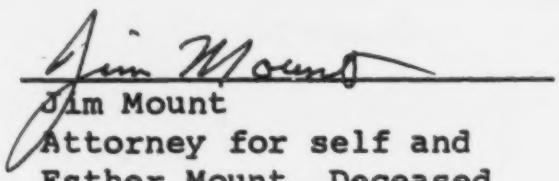
Chicago, Rock Island and Pacific Railway Co. v. Howell, 401 F. 2d 752 (10th. Cir. 1968) held in diversity suit competency of circumstantial evidence to prove plain-

tiff's case was controlled by Federal Common law. Weight and credibility of evidence was for jury to decide and not the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.



Jim Mount
Attorney for self and
Esther Mount, Deceased

January, 1990
Dated

APPENDIX A

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Monterey, Ca. 93940
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SUPERIOR COURT OF CALIFORNIA, COUNTY OF MONTEREY

ESTHER MOUNT and Husband JIM MOUNT, Plaintiffs, v. MELVIN F. GORELICK and Roger BARTELS, each individually, Defendants.	Case No. M 18548 ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

The motion of defendant ROGER BARTELS for an order granting summary judgment came regularly for hearing by the court on May 6, 1988. Plaintiff JIM MOUNT appeared in pro per. Defendant ROGER BARTELS appeared by counsel Donald A. Miller.

On consideration of all evidence set forth and the papers submitted, and the

inferences reasonably deducible therefrom, except that to which objection has been sustained, the court determines that there is no triable issue as to any material fact and that defendant ROGER BARTELS is entitled to judgment as a matter of law. Accordingly,

IT IS ORDERED that the motion of defendant be, and hereby is, granted, and that judgment be entered accordingly for defendant ROGER BARTELS and against plaintiffs ESTHER and JIM MOUNT.

Dated: MAY 16 1988

signed: RICHARD M. SILVER
JUDGE OF THE SUPERIOR COURT

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Attorneys for Defendant MELVIN F. GORELICK, M.D.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF MONTEREY

ESTHER MOUNT and
Husband, JIM MOUNT,

Plaintiffs, No. M 18548

vs. ORDER AND JUDGMENT

MELVIN F. GORELICK and
ROGER BARTELS, each
individually.

Defendants.

The motion for summary judgment of MELVIN F. GORELICK, M.D. came on regularly for hearing before the Honorable Richard M. Silver Judge of the Superior Court, on May 6, 1988.

Barry C. Marsh appeared on behalf of MELVIN F. GORELICK, M.D., Donald Miller appeared on behalf of ROGER BARTELS, M.D. and Jim Mount appeared on behalf of plaintiffs.

The motion for summary judgment was granted as requested by both defendants MELVIN F. GORELICK, M.D. and ROGER BARTELS, M.D. The order was based upon the absence of any triable issue of material fact and therefore, defendants were entitled to judgment as a matter of law. Further, the court adopted the statement of undisputed facts submitted by each defendant.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment shall be entered in favor of MELVIN F. GORELICK, M.D. and against plaintiffs, ESTHER MOUNT AND JIM MOUNT.

IT IS FURTHER ORDERED MELVIN F. GORELICK, M.D. shall be entitled to costs of suit incurred herein as against plaintiffs

ESTHER MOUNT and JIM MOUNT.

Dated: MAY 27 1988

signed: RICHARD M. SILVER
JUDGE OF THE SUPERIOR
COURT

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

Filed Sep 14 1989
Court of Appeal
Sixth App. Dist.
Michael J. Yerly,
Clerk

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

ESTHER MOUNT, et al.,

Plaintiffs and Appellants,

v.

MELVIN F. GORELICK, et al.,

Defendants and Respondents.

H004604
Monterey County
Sup. Ct. No.M 18548

STATEMENT OF THE CASE

Plaintiff Jim Mount individually and as representative for Esther Mount ("the decedent") appeals from judgments entered after the court granted summary judgment to defendant Dr. Melvin F. Gorelick, M.D., and Dr. Roger Bartels, M.D.[1] On appeal, Mount claims that the trial court erred in concluding there are no triable

issues of fact with respect to the complaint. We affirm the judgments.

---

1. Both Jim and Esther Mount filed the complaint in this action. Regretably, however, Esther Mount has since died.

SCOPE OF REVIEW

In reviewing an order granting summary judgment, we first identify the issues framed by the pleadings. (AARTS Productions, Inc. v. Crocker National Bank (1986) 179 Cal. App. 3d 1061, 1064.) Then, we determine whether the moving party's showing has established facts which negate the opponent's claim and justify a judgment in the movant's favor. (ibid.) If the motion prima facie justifies a judgment, we then determine whether the opposition demonstrates the existence of a triable, material issue of fact. (Id. at p. 1065.)

THE PLEADED ISSUES

Mount's complaint asserts causes of action against Gorelick and Bartel for medical malpractice. He alleges that Gorelick and Bartels negligently performed their surgical procedures and did not properly advise the decedent of alternative treatments and risks and, therefore, her consent to their proposed treatment was not "informed consent."

UNDISPUTED FACTS

On April 9, 1986, Gorelick examined the decedent and found a pigmented lesion on the sole of her right foot, which had been there for 15 years. He pared down the pigment but did not observe any suspicious dots, and scheduled a punch biopsy for the next morning to rule out malignant melanoma. On April 10, Gorelick again examined the lesion, pared it down a bit more and observed, interalia, that it was almost evenly black and brown throughout. He performed the biopsy and sent to obtain the appropriate tissue sample and forwarded it to Community

Hospital of the Monterey Peninsula for revies by the pathology department. The pathology department report indicated a "malignant melanoma in situ (Level 1 Malignant Melanoma)." Upon receiving the report, Gorelick referred the decedent to Bartels, a plastic surgeon, for followup surgery.

On April 14, 1986, Bartels examined the decedent. On April 25, he performed a complete surgical excision of the lesion. A laboratory analysis of the excised melanoma revealed a "malignant melanoma, superficial spreading type, Clark's Level III." Later, Bartels referred the decedent to another physician for further review and microsurgery.

In support of their motions for summary judgment, Gorelick and Bartels submitted the ;declaration of Dr. Jack C. Fisher, M.D., who reviewed all pertinent medical records reflecting the defendants' treatment of the

decedent. He stated that both doctors' approach to the lesion and treatment for it was proper, appropriate and within the applicable standard of care in Monterey in 1986.

In addition, Gorelick submitted a declaration, stating that he advised her that because the lesion was so large, a punch biopsy should be performed to rule out malignant melanoma and that it would not create problems if the lesion was benign.

Mount did not submit the declaration of an expert to contradict the opinion of defendants' expert or suggest that leaving the lesion alone was appropriate treatment. Nor did he submit a declaration from anyone who suggested an alternative treatment that was not disclosed. Finally, he submitted no declaration that decedent would have chosen a different or no treatment had the risks of the actual treatment been adequately disclosed.

DISCUSSION

Mount contends that the trial erred in granting summary judgment because the complaint and declarations established a triable issue of fact concerning defendants' negligence. In particular, he claims there is a triable issue concerning whether defendants advised the decedent about alternative treatment and/or no treatment and the respective risks involved. Citing Willard v. Hagemeister (1981) 121 Cal. App. 3d 406, defendants claim summary judgment was properly granted. We agree with defendants.

In Willard v. Hagemeister, supra, the trial court granted the defendant dentists summary judgment on claims of negligent performance and lack of informed consent. In support of their motions, the dentists submitted the declarations of two experts, who examined the plaintiff, reviewed the relevant dental records, and stated that all diagnoses and treatment were

" 'within the standard of care in the community.'" (Id. at p. 413.) The plaintiff submitted only her personal declaration that the defendant dentists acted negligently. (Ibid.)

On appeal, the court affirmed. It explained that "preemptive weight" is given to expert testimony concerning the "prevailing standard of skill and learning in the locality and of the propriety of particular conduct by the practitioner in particular instances." (Id. at p. 412.) The plainfiff's failure to submit the declaration of an expert in opposition to summary judgment was fatal to her cause because her own declaration did not raise a triable issue concerning the applicable standard of care and the propriety of the defendants' conduct. (Ibid.)

As to claims based on alleged lack of informed consent, the court explained the crucial question is whether the dentists gave the

plaintiff sufficient information about the nature of their proposed treatment so that she could intelligently decided whether to undergo the dental procedure. (Id. at p. 418.) " 'The scope of the physician's communications to the patient, then, must be measured by the patient's need, and that need is whatever information is material to the decision.'" (Ibid., quoting Cobbs v. Grant (1972) 8 Cal. 3d 229, 245.) As to this claim, "the testimony of the patient-plaintiff may establish the causal relationship between the physician's failure to inform and the plaintiff's injury." (Ibid=)

Under the circumstances in Willard, summary judgment was not proper on the lack of informed consent claim because (1) expert testimony was not needed to prove such a claim and (2) the plaintiff submitted a declaration stating that if the inherent risks of the dentists' proposed treatment had been revealed, she would not have given her consent. (Ibid.)

Here, as in Willard, an expert concluded that the diagnoses and treatment were proper and appropriate. Plaintiff, however, did not present any evidence of an alternative treatment that could have been disclosed but was not. He presented no evidence that the decedent was not fully advised concerning the proposed treatment. And he offered as evidence that the decedent would have not consented to the proposed treatment had she been fully advised of its inherent risks as opposed to the inherent risk of no treatment.

Under these circumstances, we agree with the trial court that in response to defendants summary judgment motion, which established a prima facie grounds to grant the motion, plaintiff failed via counter-declarations to raise a triable issue of fact.

DISPOSITION

The judgment is affirmed.

COURT OF APPEAL OF THE STATE OF CALIFORNIA

in and for the

SIXTH APPELLATE DISTRICT

Filed Oct 11 1989
Court of Appeal
Sixth App. Dist.
Michael J. Yerly
Clerk.

ESTHER MOUNT, et al., Plaintiffs and Appellants,	)	No. H004604
vs.	)	SUPERIOR COURT
	)	No. M18548
MELVIN F. GORELICK, et al, Defendants and Respondents)	)	

BY THE COURT

The petition
for rehearing
is denied.

Dated OCT 11, 1989

PREMO. ACTING P.J.

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

Sixth Appellate District No. H004604
S012544

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

ESTHER MOUNT Et Al., Appellants

v.

MELVIN F. GORELICK Et Al., Respondents

Appellants' petition for review DENIED.

SUPREME COURT
FILED
NOV 29, 1989

PROOF OF SERVICE BY MAIL
(1013A) (2015.5 C.C.P.)

STATE OF CALIFORNIA)
)
COUNTY OF MONTEREY)

I am now and at all times herein mentioned have been a citizen of the United State, over the age of eighteen years, a resident of Monterey County, California, and not a party to the within action or cause; that my residence address is 13209 Cielo Azul, Castroville, California 95012; that I served a copy of the:

MOUNTS' PETITION FOR A WRIT OF CERTIORARI TO THE STATE OF CALIFORNIA SUPREME COURT

by placing said copy in an envelope with first class postage prepaid to be mailed to:

Barry C. Marsh, Esq. (MAILED THREE COPIES)
152 North Third St. Ste.300d
San Jose, Ca. 95115-0030

Gerald V. Barron, Esq. (MAILED THREE COPIES)
Hoge, Fenton, Jones & Appel
P.O. Box 791
2801 Monterey-Salinas Highway
Monterey, Ca. 93940

The Clerk MAILED FORTY COPIES)
United States Supreme Court
U.S. Supreme Court Bldg.
Washington,D.C. 20543

which envelope was then sealed and, with postage fully prepaid thereon, was on May 30, 1990
deposited in the United States mail at Monterey,

California; that there is delivery service by United States mail at the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 30, 1990 at Monterey, California.

Dorothy Yates

DOROTHY YATES

Subscribed and sworn to before me, at Monterey, California, this 30th day of May, 1990

June E. Fordham

JUNE E. FORDHAM

Official Seal
JUNE E. FORDHAM
Notary Public - California
Principal Office in Monterey County
My Commission Expires May 27, 1991

(2)

No. 89-1931

In the Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT T. HOWITT, PETITIONER

v.

UNITED STATES DEPARTMENT OF COMMERCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

MARLEIGH D. DOVER
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QUESTIONS PRESENTED

1. Whether the Federal Transfer Statute, 28 U.S.C. 1631, requires a federal court to entertain an untimely action when the plaintiff has failed promptly to file in the proper court after the action was dismissed for lack of jurisdiction by another federal court.

2. Whether the Equal Access to Justice Act, 5 U.S.C. 504(c)(2), indicates which court has jurisdiction over the appeal of the fee determination in this case.

3. Whether the court of appeals based its judgment on substantive grounds not properly before it.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1931

ROBERT T. HOWITT, PETITIONER

v.

UNITED STATES DEPARTMENT OF COMMERCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 897 F.2d 583. The judgment of the district court (Pet. App. 7a-8a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1990. A petition for rehearing was denied on March 15, 1990 (Pet. App. 5a-6a). The petition for a writ of certiorari was filed as of June 4, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On September 8, 1982, petitioner applied for attorney's fees under the Equal Access to Justice Act (EAJA), 5 U.S.C. 504, to recompense him for time

spent obtaining a patent from the Patent and Trademark Office (PTO).[1] On June 16, 1983, the Deputy Assistant Commissioner for Patents issued a decision finding that the application process had not constituted an "adversary adjudication" within the meaning of the EAJA, and alternatively that the position of the government was substantially justified, rendering a fee award inappropriate. Pet. App. 14a; Gov't C.A. Br. 4. The following month, petitioner sought review before the Office of the General Counsel of the Department of Commerce.[2] Some four months later, petitioner filed a Supplemental Appeal to the General Counsel. *Ibid.*

2. In a decision and opinion by the General Counsel, dated July 2, 1986, the Department denied petitioner's application on the ground that fees are awarded under EAJA only to parties who prevail in an "adversary adjudication" with a government agency (if the position of the agency in the proceeding is not substantially justified and special circumstances do not make an award unjust). 5 U.S.C. 504 (a)(1). An "adversary adjudication" is defined in the EAJA, 5 U.S.C. 504(b)(1)(C), as "an adjudication under [5 U.S.C. 554] * * * in which the position of the United States is represented by counsel or

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[1] Petitioner's application for a patent was initially rejected by the PTO examiner; that rejection was affirmed by the PTO Board of Appeals. Petitioner's attempt to resolve the problem with his application (by filing a "notice of terminal disclaimer") was rejected by the PTO examiner as untimely. The PTO examiner in turn deemed petitioner's patent application abandoned. After petitioner sought review of that decision, the Deputy Assistant Commissioner for Patents withdrew the holding of abandonment. Pet. App. 12a-14a; Gov't C.A. Br. 2-4.

[2] Petitioner concurrently filed a request for reconsideration with the PTO, which the PTO denied. Pet. App. 14a.

otherwise." Section 554 of the Administrative Procedure Act in turn provides that "[t]his section applies * * * in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." See Pet. App. 14a-15a.

The General Counsel noted that the only statute governing the processing of a patent application that alludes to any sort of hearing is 35 U.S.C. 7, which provides for PTO Board of Appeals review of adverse decisions of patent applications, with each appeal being "heard" by at least three members of the Board. Pet. App. 18a. However, the General Counsel observed, the statute does not require the hearing to be "on the record" and the legislative history does not indicate that there is to be a trial-type proceeding. "Consequently, there is no basis for concluding that the proceeding before the Board of Appeals is covered by section 554." Pet. App. 19a. The General Counsel finally noted that there is even less basis for claiming that proceedings before the PTO examiner and the Commissioner are Section 554 adjudications. Pet. App. 19a-21a.[3]

Petitioner appealed to the Court of Appeals for the Federal Circuit. On February 18, 1987, that court dismissed the case on the ground that it had no jurisdiction to review the Commerce Department's decision to deny attorney's fees; the court also denied petitioner's rehearing request. Pet. App. 9a-10a. Ten days later, petitioner requested the Federal Circuit to recall its mandate and asked for the first time

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[3] The General Counsel noted some doubt as to the timeliness of petitioner's original fee petition, but concluded that that question need not be reached in light of the denial of petitioner's claim on other grounds. Pet. App. 21a n.5.

that the case be transferred to the United States District Court for the District of Massachusetts. The Federal Circuit denied the request as reiterated in petitioner's supplemental petition two months later. On June 13, 1987, petitioner sought review in this Court; the Court denied his petition for certiorari on October 5, 1987. Pet. App. 3a.

3. Twenty-five days later, on October 30, 1987, petitioner filed a civil action in the United States District Court for the District of Massachusetts. The district court granted the government's motion for summary judgment on the ground that the PTO proceedings were not "adversary adjudications" under 5 U.S.C. 504(a)(1) and (b)(1)(C). The court further held that petitioner had failed to file a timely fee application and had failed timely to commence the action in that court. Pet. App. 7a-8a.

On appeal, the First Circuit affirmed. The court held that the 30-day time limit provided by the EAJA, 5 U.S.C. 504(c)(2), for appeal to a federal court from an agency's fee determination is jurisdictional and therefore cannot be waived. The court also rejected petitioner's argument that the jurisdictional defect was cured because, under the Federal Transfer Statute, 28 U.S.C. 1631, the Federal Circuit should have transferred his case to the proper court. The court noted that the Federal Circuit had not in fact transferred the case, and concluded that it lacked authority to review the other appellate court's decision not to transfer. In any case, the court noted, petitioner's argument that the PTO proceedings were "adversary" was so weak that "we could not second guess a Federal Circuit determination that transfer was not 'in the interest of justice,'" as required by Section 1631. Pet. App. 3a-4a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any court of appeals. Further review is therefore not warranted.

1a. Petitioner argues (Pet. 6-9) that the district court should have taken "constructive transfer" of his case, on the ground that the Federal Transfer Statute, 28 U.S.C. 1631, *required* the Federal Circuit to transfer his case to the proper court, in this instance, the district court for the District of Massachusetts. However, the plain language of Section 1631 provides no authority for a court to transfer to itself a case that was timely filed only in another circuit. Rather, Section 1631 establishes that:

> Whenever * * * an appeal, including a petition for review of administrative action, is noticed for or filed with * * * a [federal] court and *that court* finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed * * *.

28 U.S.C. 1631 (emphasis added). In this case, the statute gave the Federal Circuit the power to transfer the case, if it had chosen to do so. It vested no such power in the district court—as prospective transferee—to accomplish by itself the same result when petitioner filed an appeal there more than fifteen months after his petition for fees was rejected by the General Counsel. And it certainly gave the district court no authority, under the euphemism of "constructive transfer," to engage in collateral review of the Federal Circuit's decision denying trans-

fer—a matter that became res judicata upon this Court's denial of the petition for certiorari to review the judgment of the Federal Circuit in October 1987.

In any event, the Federal Transfer Statute does not dictate a transfer in this case. Actions are to be transferred only if it is "in the interest of justice" to do so. 28 U.S.C. 1631. Justice would not have been served by the transfer of petitioner's fee application. As the courts below noted, the fee application was itself untimely (Pet. App. 8a) and lacked substantial merit (Pet. App. 4a, 8a).

b. The cases cited by petitioner (Pet. 8) are not to the contrary. In *Kolek* v. *Engen*, 869 F.2d 1281 (9th Cir. 1989), a litigant timely but mistakenly filed in the district court, when he should have filed in the court of appeals for the same circuit. On appeal from the district court's dismissal for lack of jurisdiction, the court of appeals held that it could "deem" the case transferred to it, given the mandatory nature of a transfer under Section 1631 and the gratuity of remanding to the district court for the reconsideration of the Section 1631 issue. 869 F.2d at 1284. The court in *Kolek* was following a previous Ninth Circuit case, *McCauley* v. *McCauley*, 814 F.2d 1350 (1987), which involved the same situation—a timely but mistaken appeal to a district court when jurisdiction properly rested with the court of appeals for the same circuit.[4] By contrast, here the district court in which petitioner ultimately sought to file lacked jurisdiction because the appeal was untimely

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[4] In similar circumstances, the District of Columbia Circuit did not cure the district court's failure to effect a transfer, because the appeal from the district court's dismissal of the case was itself untimely filed. *Center for Nuclear Responsibility, Inc.* v. *United States Nuclear Regulatory Commission*, 781 F.2d 935 (1986) (discussed at Pet. 8-9).

filed in that court and the court had no authority to review the Federal Circuit's decision or to order the Federal Circuit to transfer the case.

2. Next (Pet. 10-11), petitioner tries to excuse his untimely filings by suggesting a distinction between "the court with jurisdiction over the underlying dispute (the PT[O] proceeding)" and the court with jurisdiction over "the particular decision from which appeal is being taken (the DOC EAJA proceeding)" (Pet. 10).

Petitioner has already litigated—and lost—this jurisdictional contention before the Federal Circuit; and this Court denied certiorari. 818 F.2d 877 (Table), cert. denied, 484 U.S. 828 (1987). Under the applicable EAJA provision, 5 U.S.C. 504(c)(2), petitioner could have appealed the fees determination at issue here only in that court "having jurisdiction to review the merits of the underlying decision of the agency adversary adjudication." For the reasons set out in our previous brief in opposition, the "underlying decision" was the decision of the Deputy Assistant Commissioner to withdraw the holding of abandonment, and the court with jurisdiction to review the merits of the Deputy Assistant Commissioner's determination is the district court. See note 1, *supra;* 86-2004 Br. in Opp. 4-6 (filed August 12, 1987). Petitioner failed to file in the appropriate district court (the United States District Court for the District of Massachusetts) within 30 days. 5 U.S.C. 504(c)(2).

3. Finally, petitioner claims (Pet. 12) that the court of appeals impermissibly "reached a legal conclusion based on an issue ('adversary') [*sic*] which was intentionally not addressed by the administrative agency from which the appeal was taken." Apparently, petitioner contends that the General Coun-

sel's ruling was not based on a determination of whether the patent application proceedings were "adversary adjudication[s]" (5 U.S.C. 504(b)(1)(C)) for which fees could be awarded. Rather, in petitioner's view, the General Counsel based its ruling on the conclusion that "the patent statute does not require that patents be issued on the record with opportunity for a hearing." *Ibid.*

Petitioner fails to recognize that the General Counsel determined whether patent application proceedings were "on the record with opportunity for a hearing" in order to determine whether they constitute "adversary adjudication[s]." See Pet. App. 14a-19a. The court of appeals thus broke no new ground in noting that petitioner's arguments on this issue were unlikely ever to prevail.

In any case, the court of appeals in fact rested its judgment on the determination that it "lack[ed] the legal power to hear [petitioner's] appeal." Pet. App. 3a. It therefore properly affirmed the district court's dismissal of the case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

MARLEIGH D. DOVER
RUSSELL L. CAPLAN
Attorneys

SEPTEMBER 1990

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 262203 20123